

1-1984

Dillon v. Legg Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries

John L. Diamond

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal



Part of the [Law Commons](#)

Recommended Citation

John L. Diamond, *Dillon v. Legg Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 HASTINGS L.J. 477 (1984).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol35/iss3/2

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

Dillon v. Legg Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries

By JOHN L. DIAMOND*

In its 1968 decision of *Dillon v. Legg*,¹ the California Supreme Court rejected the majority rule and permitted a bystander who had not been in the zone of physical danger to be compensated for negligent infliction of mental distress. The court held that the defendant owed a duty to *all foreseeable* plaintiffs, and enunciated three guidelines to help courts measure foreseeability.² Sixteen years later, the meaning and wisdom of the *Dillon* decision are still debated.³ While

* Associate Professor of Law, University of California, Hastings College of the Law. B.A., 1972, Yale College; Dipl. Crim., 1973, Emmanuel College, Cambridge University; J.D., 1976, Columbia Law School.

The author gratefully acknowledges the invaluable research assistance of James J. Corbelli, Class of 1983, and Joseph R. Ramrath, Class of 1985, University of California, Hastings College of the Law.

1. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

2. *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80. See *infra* text accompanying notes 30-34.

3. See, e.g., Leibson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J. FAM. L. 163 (1976); Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "the Punishment Fit the Crime,"* 1 U. HAWAII L. REV. 1 (1979); Nolan & Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 HASTINGS L.J. 483 (1982); Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477 (1982); Simons, *Psychic Injury and the Bystander: The Transcontinental Dispute Between California and New York*, 41 ST. JOHN'S L. REV. 1 (1976); Comment, *Molien v. Kaiser Foundation Hospitals: California Expands Liability For Negligently Inflicted Emotional Distress*, 33 HASTINGS L.J. 291 (1981) [hereinafter cited as Comment, *Molien*]; Comment, *Negligent Infliction of Emotional Distress: New Horizons After Molien v. Kaiser Foundation Hospitals*, 13 PAC. L.J. 179, 201-05 (1981) [hereinafter cited as Comment, *Horizons*]; Comment, *Negligent Infliction of Emotional Distress: Reconciling the Bystander and Direct Victim Causes of Action*, 18 U.S.F.L. REV. 145 (1983) [hereinafter cited as Comment, *Reconciling*]; Note, *Molien v. Kaiser Foundation Hospitals: Negligence Actions for Emotional Distress and Loss of Consortium Without Physical Injury*, 69 CALIF. L. REV. 1142 (1981) [hereinafter cited as Note, *Molien*]; Note, *Negligent Infliction of Mental Distress: Reaction to Dillon v. Legg in California and Other States*, 25 HASTINGS L.J. 1248 (1974); Note, *Limiting Liability for the*

some states have rejected the *Dillon* analysis,⁴ an increasing number of jurisdictions are following California's lead by allowing bystanders outside of the physical zone of danger to recover damages.⁵

Subsequent California cases have illustrated a weakness in the *Dillon* approach. These later courts have applied the *Dillon* guidelines mechanically, viewing them as strict preconditions to recovery.⁶ This mechanical application has led to the erection of arbitrary limitations on recovery bearing little relation to the principles of foreseeability espoused so forcefully in *Dillon*. While in some instances mental distress is compensated, other equally foreseeable mental injuries are not. The result is feast or famine for the plaintiff depending on the fortuities of time, location,⁷ or characterization of the plaintiff as "direct" or "indirect."⁸

There is, however, a more fundamental problem with the *Dillon* court's use of the foreseeability standard. Courts have long recognized the need to limit compensation for negligent infliction of mental distress to avoid massive liability and excessive costs that could hinder socially important activities.⁹ Yet it is generally quite foreseeable that the relatives of victims will suffer some mental distress. Thus the use of a pure foreseeability standard leads to the expansive compensation that the courts have tried to avoid. The question becomes how to rationally compensate victims of intangible torts while reasonably limiting the exposure of defendants.

Some commentators believe that *Molien v. Kaiser Foundation Hospitals*¹⁰ points the way out of the *Dillon* quagmire. In *Molien*, the California Supreme Court limited the application of the *Dillon* guidelines to bystanders who suffered as "percipient" witnesses to the injury of a third person. In contrast, any foreseeable "direct" victim of the negligent act¹¹ can recover without regard to the *Dillon* guidelines.¹² Commentators have urged that the *Molien* approach be extended to all cases

Negligent Infliction of Emotional Distress: The "Bystander Recovery" Cases, 54 S. CAL. L. REV. 847 (1981) [hereinafter cited as Note, *Limiting*].

4. *E.g.*, *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969); *Guilmette v. Alexander*, 128 Vt. 116, 259 A.2d 12 (1969).

5. *See infra* note 23.

6. *See infra* notes 38-56 & accompanying text.

7. *See infra* notes 38-56 & accompanying text.

8. *See infra* text accompanying notes 71-73.

9. *See infra* notes 146-47 & accompanying text.

10. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

11. *Id.* at 922-23, 616 P.2d at 817, 167 Cal. Rptr. at 834.

12. *Id.* at 923, 616 P.2d at 817, 167 Cal. Rptr. at 834.

of negligent infliction of "serious" mental distress,¹³ whether the plaintiff is a "direct" or "indirect" victim. It is the purpose of this Article to demonstrate that this and other recent proposals will not resolve the fundamental *Dillon* dilemma, and that an alternative approach is required.

Not only do courts struggling under the *Dillon* guidelines arrive at inconsistent and inequitable results, but their failure to treat bystander claims for negligent infliction of emotional distress like claims for other intangible torts, such as loss of consortium and loss of parent-child society,¹⁴ leads to further inconsistencies.¹⁵ This morass of conflicting theories is a compelling demonstration of the desirability of the approach first elaborated by Professor Richard Miller: extending the defendant's liability to *all foreseeable plaintiffs* but restricting the *types of damages* that are recoverable.¹⁶ By restricting compensable damages

13. See Nolan & Ursin, *supra* note 3, at 609-10; Comment, *Molien*, *supra* note 3, at 312; Note, *Moline*, *supra* note 3.

14. See, e.g., Borer v. American Airlines, Inc., 19 Cal. 3d 441, 563 P.2d 858, 188 Cal. Rptr. 302 (1977). See *infra* notes 121-39 & accompanying text.

15. See *infra* notes 38-61 & accompanying text.

16. Miller, *supra* note 3, at 38-43. Courts so far have disregarded Professor Miller's prescription. General academic criticism of awarding compensation for mental distress in general has also been unsuccessful. See Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219 (1953); Morris, *Liability for Pain and Suffering*, 59 COLUM. L. REV. 476 (1959); O'Connell, *A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorney Fees*, 1981 U. ILL. L.F. 333; O'Connell & Simon, *Payment for Pain and Suffering: Who Wants What, When and Why?* 1972 U. ILL. L.F. 1. But see Seffert v. Los Angeles Transit Lines, 56 Cal. 2d 498, 509, 364 P.2d 337, 344, 15 Cal. Rptr. 161, 171 (1961) (Traynor, J., dissenting) (implying criticism of compensation for mental distress in general).

There has been forceful criticism of the rationale for awarding damages for pain and suffering in negligence cases. Such damages originated under primitive law as a means of punishing wrongdoers and assuaging the feelings of those who had been wronged. They become increasingly anomalous as emphasis shifts in a mechanized society from ad hoc punishment to orderly distribution of losses through insurance and the price of goods or of transportation. Ultimately such losses are borne by a public free of fault as part of the price for the benefits of mechanization. Nonetheless, this state has long recognized pain and suffering as elements of damages in negligence cases; any change in this regard must await reexamination of the problem by the Legislature. Meanwhile, awards for pain and suffering serve to ease plaintiffs' discomfort and to pay for attorney fees for which plaintiffs are not otherwise compensated.

Id. (citations omitted). Justice Traynor's concession to established precedent would not apply to newly developing intangible torts. Justice Traynor dissented in *Dillon*, stating that he would limit recovery to plaintiffs within the zone of physical danger. *Dillon v. Legg*, 68 Cal. 2d 728, 748, 441 P.2d 912, 925, 69 Cal. Rptr. 72, 85 (1968). Justice Traynor did, however, endorse liability for *intentional* infliction of mental distress where the cost of compensation would not be spread so as to excessively burden the insured community. See *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952) (Traynor, J.).

to economic loss resulting from the negligent infliction of emotional distress, as Professor Miller suggests, and substantially extending Professor Miller's thesis to include loss of consortium and parent- and child-society claims, the courts could develop an equitable and reasoned basis for compensation. Such a unified approach would provide relief to foreseeable plaintiffs in all intangible tort cases, yet keep recovery within economically acceptable limits. The recent California decision of *Turpin v. Sortini*,¹⁷ now followed in one other state,¹⁸ suggests that some courts may be receptive to such an approach.¹⁹

Recovery for Negligently Inflicted Mental Distress

Courts traditionally have been reluctant to allow compensation to anyone for mental distress.²⁰ The initial common law rule allowed recovery for mental pain only as parasitic damages accompanying physical injury,²¹ but the courts ultimately permitted compensation for mental distress with any physical "impact," regardless of whether the impact resulted in a physical "injury."²² Subsequent "near miss" cases led to the current majority rule allowing compensation for the negligent infliction of mental distress to plaintiffs within the zone of physical danger, even in the absence of physical impact.²³ Under the majority

17. 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

18. *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 646 P.2d 483 (1983).

19. See *infra* text accompanying notes 152-57.

20. Objections advanced against allowing such recovery have included the inability to measure such injury in terms of money, see, e.g., *Perry v. Capital Traction Co.*, 32 F.2d 938 (D.C. Cir. 1929); *Cleveland, C.C. & St. L. Ry. Co. v. Stewart*, 24 Ind. App. 374, 56 N.E. 917 (1900), the potential for fraudulent claims, see, e.g., *Huston v. Borough of Freemansburg*, 212 Pa. 548, 61 A. 1022 (1905), the flood of litigation that would result from compensating mental distress, and the concomitant cost to society, see, e.g., *Spade v. Lynn & B. Ry. Co.*, 168 Mass. 285, 47 N.E. 88 (1897); *Ward v. West Jersey & S. Ry. Co.*, 65 N.J.L. 383, 47 A. 561 (1900).

21. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 12, at 50 (4th ed. 1971). The intentional tort of assault constituted an early exception. See *id.* § 10, at 38. The tort of *intentional* infliction of mental distress constituted a much more recent development. See *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952); see also *supra* note 16.

22. W. PROSSER, *supra* note 21, § 54, at 331. See, e.g., *Homans v. Boston Elev. Ry.*, 180 Mass. 456, 62 N.E. 737 (1902); *Zelinsky v. Chimics*, 196 Pa. Super. 312, 175 A.2d 351 (1961).

23. See, e.g., *Daley v. LaCroix*, 384 Mich. 4, 179 N.W.2d 390 (1970); *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961); *Niederman v. Brodsky*, 435 Pa. 401, 261 A.2d 84 (1970). See 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 18.4, at 1034 (1956); Annot., 64 A.L.R.2d 100, 148-49 (1959). Although the zone of danger rule remains the position of a majority of states, a growing number of states have adopted the *Dillon* rule or have expanded liability even further to allow recovery for bystanders. See, e.g., *Haught v. Maceluch*, 681 F.2d 291 (5th Cir. 1982); *D'Amico v. Alvarez Shipping Co.*, 31 Conn.

rule today, the bystander must be in the zone of physical danger,²⁴ and the mental distress suffered by the plaintiff must be physically manifested.²⁵

California Departs From the Majority

In *Dillon v. Legg*,²⁶ the California Supreme Court rejected the

Supp. 164, 326 A.2d 129 (1973); *Barnhill v. Davis*, 300 N.W. 2d 104 (Iowa 1981); *Culbert v. Sampson's Supermarkets, Inc.*, 444 A.2d 433 (Me. 1982); *Corso v. Merrill*, 119 N.H. 647, 406 A.2d 300 (1979); *Portee v. Jaffe*, 84 N.J. 88, 417 A.2d 521 (1980); *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979); *Landreth v. Reed*, 570 S.W.2d 486 (Tex. Civ. App. 1978); see also *Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507, 413 N.E.2d 690 (1980) (extending liability beyond the *Dillon* limitations by abandoning a strict "contemporaneous observance" requirement while affirming a substantial physical injury manifestation requirement). See generally *Lambert, Tort Liability for Psychic Injuries: Overview and Update*, 37 A. TRIAL LAW. AM. L.J. (1978).

24. See, e.g., *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969); *Shelton v. Russell Pipe & Foundry Co.*, 570 S.W.2d 861 (Tenn. 1978); *Guilmette v. Alexander*, 128 Va. 116, 259 A.2d 12 (1969). ACCORD RESTATEMENT (SECOND) OF TORTS § 436 (1965).

There is some question in several jurisdictions as to whether a plaintiff can recover damages for the distress of witnessing another's injury, or only for the distress occasioned by a fear for one's own safety. See, e.g., *Lessard v. Tarca*, 20 Conn. Supp. 295, 133 A.2d 625 (1957); *Klassa v. Milwaukee Gas Light Co.*, 273 Wis. 176, 77 N.W.2d 397 (1956). Courts expressly permitting recovery for the fear of another when the plaintiff is in the zone of danger include *Bowman v. Williams*, 164 Md. 397, 165 A. 182 (1933); *Greenberg v. Stanley*, 51 N.J. Super. 90, 143 A.2d 488 (1958). As a practical matter it is difficult to differentiate distress resulting from fear for one's own safety and fear for another's, and thus some jurisdictions have not focused on the distinction and permit full recovery for all mental distress so long as the plaintiff was within the zone of physical danger. See *Hambrook v. Stokes Brothers*, 1 K.B. 141 (1925); W. PROSSER, *supra* note 21, § 54, at 333-34.

25. 2 F. HARPER & F. JAMES, *supra* note 23, at 1031-33; W. PROSSER, *supra* note 21, § 54, at 328; RESTATEMENT (SECOND) OF TORTS § 436A comment b (1965). Some courts make an exception in cases involving telegraphic companies and negligent mishandling of corpses from this requirement. See, e.g., *Daley v. LaCroix*, 384 Mich. 4, 8, 179 N.W.2d 390, 392 (1970); see also W. PROSSER, *supra* note 21, § 54, at 329-30. Such physical manifestation is seen in part to authenticate the severity of the mental distress. But see *Hedlund v. Superior Court*, 34 Cal. 3d 695, 706 n.8, 669 P.2d 41, 47 n.8, 194 Cal. Rptr. 805, 811 n.8 (1983) (rejecting majority rule's requirement of physical manifestation); *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 928-31, 616 P.2d 813, 819-21, 167 Cal. Rptr. 831, 838-39 (1980) (same). See *infra* notes 109-16 & accompanying text. However, recent advances in medical science and psychiatry as well as related developments in the law have blurred the meaning of "physical manifestations." Some courts have held that relatively minor physical symptoms, which often depend on the plaintiff's own testimony for verification, are sufficient to meet the requirement. See, e.g., *Daley v. LaCroix*, 384 Mich. 4, 15-16, 179 N.W.2d 390, 396 (1970). In many instances this has eliminated a potential barrier to compensation for all mental distress. See *infra* notes 111-13 & accompanying text. Nevertheless, most courts still require physical manifestation of some kind. *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 925-26, 616 P.2d 813, 818, 167 Cal. Rptr. 831, 836 (1980); RESTATEMENT (SECOND) OF TORTS § 436A (1965); W. PROSSER, *supra* note 21, § 54 at 328-29.

26. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

zone of danger requirement, holding that a mother could recover for physically manifested severe mental distress suffered when she witnessed her daughter being struck by a negligently operated automobile. The facts in *Dillon* presented a particularly compelling basis for rejecting the zone of danger requirement. The plaintiffs, a mother and daughter, both witnessed another daughter being hit and killed, but only the surviving daughter was arguably in the zone of physical danger.²⁷ The *Dillon* majority found it inappropriate that a "few yards" difference should preclude the mother from recovering for emotional trauma.²⁸ Consequently, the court reversed its position that the concept of a limited duty precludes liability to a plaintiff outside the zone of physical danger, noting that "[i]n the absence of 'overriding policy considerations . . . foreseeability of risk [is] of . . . primary importance in establishing the element of duty.'" ²⁹ The majority rejected the argument that permitting recovery to bystanders for the negligent infliction of mental distress would flood the courts with "fraudulent" and "inadequate" claims,³⁰ stating that "[i]n order to limit the otherwise potentially infinite liability which would follow every negligent act, the law of torts holds defendant amenable only for injuries to others which to defendant at the time were reasonably foreseeable."³¹

The *Dillon* court thus established foreseeability as the chief element limiting the defendant's duty and, therefore, liability. While the court recognized that "no immutable rule can establish the extent of that obligation for every circumstance of the future,"³² it listed three factors to take into account when determining "whether defendant should reasonably foresee the injury to plaintiff" and thereby owe the plaintiff "a duty of due care"³³:

- (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it.
- (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence.
- (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.³⁴

27. *Id.* at 732-33, 441 P.2d at 915, 69 Cal. Rptr. at 75.

28. *Id.* at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75.

29. *Id.* at 739, 441 P.2d at 919, 69 Cal. Rptr. at 79 (quoting *Grafton v. Mollica*, 231 Cal. App. 2d 860, 865, 42 Cal. Rptr. 306, 310 (1965)).

30. *Id.* at 736-39, 441 P.2d at 917-19, 69 Cal. Rptr. at 77-79.

31. *Id.* at 739, 441 P.2d at 917-19, 69 Cal. Rptr. at 79.

32. *Id.* at 740, 441 P.2d at 917-19, 69 Cal. Rptr. at 80.

33. *Id.*

34. *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

Like jurisdictions following the majority rule, the court expressly confined its ruling to cases in which the plaintiff suffered mental distress that resulted in physical manifestations.³⁵ The court also made clear that its concept of reasonable foreseeability was to be applied by an *objective* standard.³⁶ The *Dillon* majority viewed its adoption of the foreseeability standard as a resolution of the compensation problem by "application of the principles of tort, not by the creation of exceptions to them."³⁷

The *Dillon* Disaster: Mechanical Application and Inequitable Distinctions

A review and comparison of subsequent California cases illustrates the confusion and inconsistencies resulting from *Dillon*. In *Hathaway v. Superior Court*,³⁸ for example, the plaintiff's son was electrocuted by touching an evaporative cooler while playing outside. Although the child's mother heard her son make a noise, it was not "like a scream or cry and it did not alarm her."³⁹ Shortly thereafter, Mrs. Hathaway heard her son's playmate say, "Let go, Michael, let go," but this remark still did not alarm the adults in the house. The playmate then rushed into the house and explained that something was wrong with Michael. Within a minute or two of hearing her son make the noise, Mrs. Hathaway arrived with her husband to see their son lying in a puddle of water by the cooler in a "dying state." When the parents reached their son he still had a recognizable pulse, but his mother was not sure he was breathing.⁴⁰

The appellate court held that since the child "was no longer gripping the water cooler and receiving the electrical charge, . . . [t]he

35. *Id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

36. *Id.* at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81. According to the court, reasonable foreseeability "does not turn on whether the particular defendant as an individual would have in actuality foreseen the exact accident and loss; it contemplates that courts, on a case-to-case basis, analyzing all the circumstances, will decide what the ordinary man under such circumstances should reasonably have foreseen." *Id.*

37. *Id.* at 747, 441 P.2d at 925, 69 Cal. Rptr. at 85. The court continued: "Legal history shows that artificial islands of exceptions, created from the fear that the legal process will not work, usually do not withstand the waves of reality and, in time, descend into oblivion." *Id.* "The refusal to apply these general rules to actions for this particular kind of physical injury is nothing short of a denial of justice." *Id.* at 746, 441 P.2d at 924, 69 Cal. Rptr. at 84 (quoting Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260, 277 (1921)) (emphasis added). See *infra* notes 110-39 & accompanying text (discussion of distinction between physical and intangible injuries).

38. 112 Cal. App. 3d 728, 169 Cal. Rptr. 435 (1980).

39. *Id.* at 730, 169 Cal. Rptr. at 436.

40. *Id.* at 730-31, 169 Cal. Rptr. at 437.

event which constituted the accident had ended."⁴¹ Consequently, the court found that the parents had not "sensorily perceived the injury-causing event" but only had perceived the results after the accident was over.⁴² This was held insufficient to meet the *Dillon* requirement of a "direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident."⁴³

The *Hathaway* court distinguished the facts before it from those of *Nazaroff v. Superior Court*,⁴⁴ in which another California appellate court allowed a mother to be compensated for distress after arriving at a neighbor's pool just as her three year old son was being pulled from the water, still alive. In *Nazaroff*, the court held that the jury could have concluded that the accidental drowning was still in progress.⁴⁵ The *Hathaway* court also distinguished *Archibald v. Braverman*,⁴⁶ in which the mother of a thirteen year old boy severely injured in a gun-powder explosion was permitted to recover for her emotional distress. Although in *Archibald* the mother arrived "within moments" of the explosion, the *Hathaway* court noted that *Archibald* "has been explained in numerous cases on the ground that the mother heard the explosion and therefore sensorily perceived it."⁴⁷

In another recent California case, *Cortez v. Marcias*,⁴⁸ a mother who had watched her child die in a hospital, allegedly as a result of the hospital's negligence, was denied recovery for mental distress because she had thought that the child was merely falling asleep. Only after she had paid the hospital bill was she told that she had in fact witnessed her son's death. The *Cortez* court concluded that the mother's shock did not result from a contemporaneous observation but from learning of her child's death moments later.⁴⁹

41. *Id.* at 736, 169 Cal. Rptr. at 440.

42. *Id.*

43. *Id.*

44. 80 Cal. App. 3d 553, 145 Cal. Rptr. 657 (1978).

45. *Id.* at 566-67, 145 Cal. Rptr. at 664.

46. 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969).

47. *Hathaway*, 112 Cal. App. 3d at 734, 169 Cal. Rptr. at 439. *Archibald* has been distinguished in this manner in several cases, although the decision itself did not rely on the mother's audio perception. See *Justus v. Atchison*, 19 Cal. 3d 564, 584, 565 P.2d 122, 135, 139 Cal. Rptr. 97, 110 (1977); *Krouse v. Graham*, 19 Cal. 3d 59, 76, 562 P.2d 1022, 1031, 137 Cal. Rptr. 863, 872 (1977); *Jansen v. Children's Hosp. Medical Center*, 31 Cal. App. 3d 22, 24-25, 106 Cal. Rptr. 883, 885 (1973).

48. 110 Cal. App. 3d 640, 167 Cal. Rptr. 905 (1980).

49. *Id.* at 650, 167 Cal. Rptr. at 910. See *infra* note 56 & accompanying text.

In a recent court of appeal decision, *Ochoa v. County of Santa Clara*, 191 Cal. Rptr. 907 (Cal. App. 1983) (depublished, hearing granted by California Supreme Court Sept. 29, 1983 (Civ. No. A017570)), the court denied the plaintiff parents recovery for mental distress

Another appellate court faced with somewhat different facts came to the opposite result. In *Mobaldi v. Regents of University of California*,⁵⁰ a foster mother, holding her child, saw him becoming spastic and finally comatose when injected with a fifty percent glucose solution instead of the prescribed five percent solution.⁵¹ Because the mother was present at the scene and contemporaneously observed the injection of the unsafe glucose solution, she was permitted to recover, even though she was unaware at the time that negligence caused the accident.⁵²

The California Supreme Court itself has mechanically applied its *Dillon* guidelines. Nine years after *Dillon*, in *Justus v. Atchison*,⁵³ the court refused to allow a husband to recover for shock resulting from his observation, while his wife was in labor, of allegedly negligent medical procedures resulting in the death of the fetus. Although the husband "witnessed certain disturbing developments in the delivery room" that "no doubt induced a growing sense of anxiety on the plaintiff's part," the court found that the husband's "anxiety did not ripen into the disabling shock which resulted from the death of the fetus until he was actually informed of that event."⁵⁴ The court reaffirmed that "learning of the accident from others after its occurrence" will not support a cause of action under *Dillon*.⁵⁵ The court expressly approved the appellate decisions that mechanically applied the *Dillon* guidelines.⁵⁶

Conversely, in the case of *Krouse v. Graham*,⁵⁷ decided the same year, the California Supreme Court allowed a husband to maintain a claim for shock resulting from "perceiving" his wife killed in a collision

caused by alleged inadequate medical treatment given to their child because "[t]he allegedly negligent acts and omissions complained of in the present case are not the type of generally sudden occurrences which have produced actionable shock or direct emotional impact in the *Dillon* line of cases." *Id.* at 916. The *Ochoa* case is currently pending before the California Supreme Court. See also *Madigan v. City of Santa Anna*, 145 Cal. App. 3d 607, 193 Cal. Rptr. 593 (1983); *Parsons v. Superior Court*, 81 Cal. App. 3d 506, 146 Cal. Rptr. 495 (1978); *Arnuz v. Gerhardt*, 68 Cal. App. 3d 937, 137 Cal. Rptr. 619 (1977); *Jansen v. Children's Hosp. Medical Center*, 31 Cal. App. 3d 22, 106 Cal. Rptr. 883 (1973).

50. 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976).

51. *Id.* at 578, 127 Cal. Rptr. at 723.

52. *Id.* at 583, 127 Cal. Rptr. at 727.

53. 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977).

54. *Id.* at 585, 565 P.2d at 136, 139 Cal. Rptr. at 111.

55. *Id.* (citing *Dillon v. Legg*, 68 Cal. 2d 728, 741, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968)).

56. *Id.* at 582-84, 565 P.2d at 134-35, 139 Cal. Rptr. at 109-10. The court also noted that, unlike in *Dillon* where the plaintiff was an "involuntary witness to the accident," the husband was in the delivery room "by his own choice." *Id.* at 585, 565 P.2d at 136, 139 Cal. Rptr. at 111. See also *Cortez v. Marcias*, 110 Cal. App. 3d 640, 650, 167 Cal. Rptr. 905, 910 (1980).

57. 19 Cal. 3d 49, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977).

while she was unloading groceries from the back seat of the car in which he was sitting. The court was careful to emphasize that while the husband did not actually see his wife being struck by the defendant's car, he contemporaneously perceived the accident and its likely effect through other than visual means.⁵⁸

Cases like *Hathaway*, *Cortez*, and *Justus* demonstrate the arbitrariness inherent in a mechanical application of the *Dillon* guidelines. In each case the plaintiff had perceived the allegedly negligent act and the fatal result. It is not at all clear that the plaintiffs' mental anguish was significantly diminished merely because they were not present at the accident or did not recognize the significance of the event until later. The eventual mental distress of each plaintiff was quite foreseeable. While the *Dillon* court rejected the artificiality of awarding or denying compensation for mental distress on the "happenstance" of a "few yards," these later courts have determined liability on the happenstance of a few seconds or minutes.

It can be argued, of course, that nothing is awry. While cases like *Hathaway*, *Cortez*, and *Justus* may appear to unfairly deny compensation, the pre-*Dillon* majority rule clearly would have precluded compensation in these cases because the bystander plaintiffs were not themselves in the zone of danger. In other words, the effect of *Dillon* is to extend the line and permit compensation in some additional cases. It can be argued that whenever such a line is drawn, cases falling close to the line will make any rule seem arbitrary. Furthermore, some may argue that there is a real distinction between the psychological distress suffered from witnessing injury to a close relative and learning of it even moments later, and that a line drawn on this basis is not arbitrary.⁵⁹

58. *Id.* at 76, 562 P.2d at 1031, 137 Cal. Rptr. at 872.

In a recent court of appeal decision, *Nevels v. Yeager*, 152 Cal. App. 3d 162, 199 Cal. Rptr. 300 (1984), the court held that "when a close relative arrives on the scene of an accident soon after its occurrence, so that the scene is substantially as it was at the instant of the accident and sees the victim, who has suffered severe injury with all its attendant gore, and suffers shock therefrom, that relative has experienced shock contemporaneous with the accident." *Id.* at 170, 199 Cal. Rptr. at 310. In *Nevels*, the plaintiff was three quarters of a mile away from the automobile accident that injured her child and arrived within ten minutes of its occurrence. The court rejected a strict application of the *Dillon* guidelines, emphasizing the "substantially contemporaneous perception" of the accident. *Id.* While this is a less mechanical approach, it is still arbitrary and does little to solve the problems in this area. Perception of the accident scene, just like perception of the accident itself, is neither a prerequisite for foreseeable mental distress nor a fair means of determining whether recovery is justified.

59. See Note, *Limiting*, *supra* note 3, at 868-70 (distinguishing between fear, shock, and grief).

Despite such justifications, there is something wrong with a standard expressly based on foreseeability that grants compensation in one case but denies it in another case in which mental distress was just as foreseeable.⁶⁰ There is an internal contradiction between the passionate *Dillon* mandate to apply the traditional foreseeability test to avoid injustice, and the application of rules that preclude compensation on the basis of the percipient witness' momentary delay in reaching the accident or in recognizing its significance.

Some commentators have argued that this inconsistency does not mean that *Dillon* is a poor decision, but simply that it is misunderstood or misapplied. The three factors in *Dillon*, it is argued, were meant as guidelines and not as strict rules to be applied mechanically.⁶¹ Yet the problem is more basic. The *Dillon* guidelines, which have been applied by California courts as limitations on duty, do not rely solely on the relationship between the plaintiff and the defendant, as do many traditional barriers to tort recovery. Rather, they are based on the fortuities of the circumstances in which the plaintiff suffered the injury. As a result, these guidelines act neither as realistic indicators of foreseeability nor as rational limitations on the recovery of damages for such injuries.

The Flaws in the *Dillon* Foreseeability Standard

Guidelines that Don't Guide

The *Dillon* court used foreseeability as a limit on duty. The concept of limited duty is used by courts to limit the liability of persons who act unreasonably, and is based on policy considerations that outweigh the policy of compensating victims of negligent conduct.⁶² Ordinarily, a plaintiff suing a defendant for negligent conduct is permitted to recover upon a showing that the defendant owed plaintiff a duty

60. See *supra* note 47.

61. See Nolan & Ursin, *supra* note 3, at 620-21. Cf. *supra* note 58.

62. W. PROSSER, *supra* note 21, § 53, at 324-25. The California Supreme Court has attacked, on a variety of fronts, traditional limitations on a defendant's duty to foreseeable plaintiffs. See, e.g., Sprecher v. Adamson Cos., 30 Cal. 3d 358, 636 P.2d 1121, 173 Cal. Rptr. 783 (1981) (eliminated limitation on the duty owed by the owners of undeveloped land for injuries caused to adjacent landowners); Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973) (held that so-called "guest statutes," which limit the duty owed by a driver to his passenger, violate constitutional guarantees of equal protection); Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971) (abrogated parental immunity); Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968) (overturned the traditional rule that landowners do not owe a legal duty of reasonable care to social guests or trespassers).

because he or she was a "foreseeable" plaintiff, that the defendant's behavior was unreasonable under the circumstances, and that this behavior was the proximate cause of the plaintiff's injury.⁶³

Yet the "limited duty" concept even limits the defendant's potential liability with regard to "foreseeable" plaintiffs.⁶⁴ Policy considerations may require greater restrictions on a particular defendant's potential liability than the restrictions provided by foreseeability alone, due to the defendant's special status or relationship with the plaintiff.⁶⁵ Limited duty also has been used to limit liability for special categories of behavior even when such behavior is both unreasonable and the proximate cause of the plaintiff's injury.⁶⁶

Limited duty for mental distress as expressed in the *Dillon* guidelines, however, focuses neither entirely on status nor on behavior. It instead limits liability based on the fortuitous circumstances in which the plaintiff suffered the damage. The plaintiff outside the foreseeable zone of physical injury but within the foreseeable zone of psychological injury can only recover, under the prevailing rigid interpretations of *Dillon*, if *Dillon*'s three criteria are met. Oddly, only one of these three criteria is consistent with a foreseeability analysis.

The *Dillon* criterion that requires a close relationship between the victim and the bystander plaintiff⁶⁷ is clearly relevant to a foreseeability analysis. It is relatively unlikely that a bystander will suffer profound mental distress upon learning of a stranger's tragedy. It is more foreseeable that a bystander will suffer profound shock upon witnessing a stranger suffer injury, but this result is still much less likely than when the victim is a close relative.⁶⁸ If this were the only *Dillon*

63. W. PROSSER, *supra* note 21, § 53, at 324-25.

64. *Id.*

65. For example, "Good Samaritan" statutes designed to encourage physicians to treat those in need of emergency care restrict liability for negligent medical care when there is a particular relationship between the doctor and his or her patient. See Comment, *The Good Samaritan and the Law*, 32 TENN. L. REV. 287 (1965); Note, *Good Samaritan Legislation: An Analysis and a Proposal*, 38 TEMPLE L.Q. 418 (1965).

66. The courts' reluctance to impose an affirmative duty to rescue in the absence of a special relationship between the defendant and the plaintiff exemplifies this kind of limited duty. It may be unreasonable not to throw a life preserver to a drowning person, but courts usually hold that there is no legal duty to do so. See W. PROSSER, *supra* note 21, § 56, at 338-50; Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217 (1908); Landes & Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978).

67. *Dillon*, 58 Cal. 2d at 741, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81.

68. While courts have construed this third *Dillon* guideline to exclude non-family relationships, a more liberal concept of "close relationship" would be a better predictor of severe emotional distress. See *Drew v. Drake*, 110 Cal. App. 3d 555, 168 Cal. Rptr. 65 (1980) (non-

criterion used to limit compensation, it could hardly be called arbitrary or inconsistent with foreseeability concepts, although some foreseeable plaintiffs would still be denied compensation. Indeed, it essentially would be an extension of liability based on loss of consortium and loss of society tort theories.

The other two *Dillon* guidelines, however, are problematical. The criterion of "nearness"⁶⁹ seems far from essential to a foreseeability analysis.⁷⁰ It has not been shown, and it is not self-evident, that proximity to the accident necessarily determines the severity of psychological trauma. In fact, the relative's guilt feelings about not being present could exacerbate the psychological trauma in certain cases. If the severe mental distress of bereaved relatives does not hinge on how "near" they were to the scene, it follows that the primary policy rationale for including a spatial condition is not to ensure that the plaintiff was foreseeable, but to limit damages by precluding some foreseeable plaintiffs from suing or recovering.

Dillon's "direct emotional impact from sensory and contemporaneous observance" limitation⁷¹ is also irrelevant to a foreseeability analysis. The close relative must arrive while the accident is still occurring, not a second later when only the destructive aftermath exists.⁷² While the *Dillon* majority balked at denying liability on the basis of a few feet, cases like *Hathaway*, *Cortez*, and *Justus* use this "contemporaneous observance" criterion to limit liability on the basis of a few moments.⁷³ Again there is no persuasive evidence that contemporaneous sensory perception of the actual accident is a prerequisite of severe mental harm, or that such perception merits compensation while witnessing the destructive results does not. *Dillon* has replaced an arbitrary spatial boundary with an arbitrary temporal limit.

married roommates). *But see* *Butcher v. Superior Court*, 139 Cal. App. 3d 48, 188 Cal. Rptr. 503 (1983) (court allowed a common law spouse to recover for loss of consortium, relying in part on Judge Poche's strong dissent in *Drake*). *Contra* *Hendrix v. General Motors Corp.*, 144 Cal. App. 3d 296, 193 Cal. Rptr. 922 (1983) (common law spouse).

69. *Dillon*, 68 Cal. 2d at 741, 441 P.2d at 920, 69 Cal. Rptr. at 80.

70. *See* *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969) (rejects *Dillon* and adheres to zone of danger rule for this reason).

71. *Dillon*, 68 Cal. 2d at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

72. *Compare* *Nazaroff v. Superior Court*, 80 Cal. App. 3d 553, 145 Cal. Rptr. 657 (1978), *with* *Hathaway v. Superior Court*, 112 Cal. App. 3d 728, 169 Cal. Rptr. 435 (1980). *But see* *Nevels v. Yeager*, 152 Cal. App. 3d 162, 199 Cal. Rptr. 300 (1984) (discussed *supra* note 58).

73. *See supra* text accompanying notes 38-49.

Foreseeability as an Inadequate Mechanism for Determining Damages

The *Dillon* court purported to replace traditional measures of duty in mental distress cases with a duty limited only by foreseeability. One of the *Dillon* court's mistakes was to announce guidelines that are not relevant to the foreseeability analysis it so forcefully espoused. Yet the court made a more fundamental error: it failed to recognize that while foreseeability may be an appropriate means of determining liability in mental distress cases, it cannot be used to limit damages for intangible losses in a socially acceptable way.

The foreseeability principle allows potential defendants to plan for liability, through insurance coverage and other risk spreading mechanisms, by limiting potential losses to a class of plaintiffs and type of damage that can be reasonably anticipated if a particular activity is engaged in negligently.⁷⁴ The problem with utilizing "foreseeability" in bystander mental distress cases, however, is that in most instances involving close relatives such distress is quite foreseeable and the potential losses would be exceedingly burdensome to compensate.⁷⁵ Courts have long recognized the evident perils of using a wide-open

74. See W. PROSSER, *supra* note 21, § 43, at 267; Fleming, *The Passing of Polemis*, 39 CAN. B. REV. 489, 508-16 & n.93 (1961).

75. Legislative concern for the social costs of allowing recovery for emotional distress was manifested by the California legislature when it passed the Medical Injury Compensation Reform Act, 1975 Cal. Stat., 2d Ex. Sess., ch.1, at 3969. Section 24.6 of the Act limits the recovery for mental distress in medical malpractice cases to \$250,000. See CAL. CIV. CODE § 3333.2(b) (West Supp. 1984). This section has been challenged on constitutional grounds. See *Fein v. Permanente Medical Group*, 175 Cal. Rptr. 177 (Cal. App. 1981) (statute not a violation of equal protection) (depublished, hearing granted by California Supreme Court); Sulnick, *Medical Malpractice Reform Act (1975): The Failure of AB1XX (Keene) to Deal with Medical Malpractice—A Constitutional Tragedy*, 15 CAL. TRIAL LAW. J. 17, 19-24 (1976); Note, *California's Medical Injury Compensation Reform Act: An Equal Protection Challenge*, 52 S. CAL. L. REV. 829, 951-55 (1979).

Although some form of general legislative limit on recovery for mental distress and other intangible injuries is possible, it would have no relevance to the damages actually suffered. It also would not eliminate current inconsistencies that limit recovery to only some foreseeable plaintiffs.

The potential impact of any restriction on mental distress recovery may be gauged by the published "estimate" that 49 cents of each dollar paid in an automobile accident case is for pain and suffering. See O'Connell, *supra* note 16, at 355-56 (citing P. KEETON & R. KEETON, TORTS: CASES AND MATERIALS 792-93 (2d ed. 1977)); see also M. FRANKLIN & R. RABIN, TORT LAW AND ALTERNATIVES 445-46 (3d ed. 1983). Presumably this figure primarily includes pain and suffering parasitic to a direct physical injury that would not be affected by limitations on independent intangible tort recovery. While a significant portion of this recovery may in fact be utilized to compensate attorneys, the percentage estimated illustrates the potential economic implications of either expanding or limiting recovery allowed for intangible losses.

foreseeability standard when considering liability for non-physical injuries.

The classic *Kinsman* decisions⁷⁶ illustrate the practical difficulties inherent in relying on foreseeability as a limiting standard. In *Kinsman No. 1*, defendants negligently allowed a river to become blocked due to the collapse of a bridge, resulting in damage to plaintiff's riparian property. The Second Circuit, in an opinion by Judge Friendly, found the injury sufficiently foreseeable to impose liability. The court noted that when "the damages resulted from the same physical forces whose existence required the exercise of greater care than was displayed and were of the same general sort that was expectable, unforeseeability of the exact developments and of the extent of the loss will not limit liability."⁷⁷

Yet in *Kinsman No. 2*, decided four years later, a unanimous Second Circuit panel refused to allow a claim made by the owners of wheat stored aboard a ship downstream from the same bridge as in *Kinsman No. 1*. The plaintiff sought compensation for the added expense resulting from the inability to move the grain to elevators located on the other side of the bridge. Such economic loss to those depending on an unobstructed river was the predictable outcome of the incident, but after an elaborate analysis of the foreseeability concepts enunciated in *Kinsman No. 1*, Judge Kauffman conceded that it "is all a question of expediency . . . of fair judgement, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind."⁷⁸

Although not analyzed in such terms by the Second Circuit in *Kinsman No. 2*, courts traditionally have been hesitant to award damages for purely economic loss in the absence of personal injury or property damage stemming from negligence.⁷⁹ In a similar manner, courts traditionally have refrained from awarding damages for mental distress unless such distress is parasitic to personal physical injury.⁸⁰ The *Dillon* court rejected the limitation in part and instead suggested that the traditional mechanism of foreseeability should serve to limit liability.⁸¹

76. Petition of *Kinsman Transit Co.* (*Kinsman No. 2*), 388 F.2d 821 (2d Cir. 1968); Petition of *Kinsman Transit Co.* (*Kinsman No. 1*), 338 F.2d 798 (2d Cir. 1964).

77. *Kinsman No. 1*, 338 F.2d at 726.

78. *Kinsman No. 2*, 388 F.2d at 825 (quoting *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 354-55, 162 N.E. 99, 104 (1928) (Andrews, J., dissenting)).

79. Harvey, *Economic Losses and Negligence: The Search for a Just Solution*, 50 CAN. B. REV. 580 (1972). See *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974).

80. See *supra* note 20 & accompanying text.

81. See *supra* notes 29-31 & accompanying text.

The experience of the Hawaii Supreme Court is also instructive. The court initially adopted a pure foreseeability standard for all cases of serious mental distress, but later retreated when faced with the spectre of unlimited liability. In *Rodrigues v. State*,⁸² the court endorsed liability for all foreseeable plaintiffs who suffer serious mental distress,⁸³ remanding the case to the trial court to determine whether the mental distress suffered by the owner of a recently completed home when it was negligently destroyed was a "reasonably foreseeable consequence of the defendant's act."⁸⁴ The court also affirmed compensation for the mental distress of a child who witnessed his step-father's mother killed in an accident.⁸⁵ The Hawaii court balked, however, when asked to allow compensation for the death of a grandfather living in California, who suffered a heart attack when told that his daughter and granddaughter had been killed and another granddaughter injured as a result of the defendant's negligence in Hawaii.⁸⁶ Although it was surely foreseeable that a grandfather would suffer mental distress under these circumstances, the geographical distance ultimately proved too great for the court to justify compensation. The court, while purporting to adhere to the concept of foreseeability, imposed the strict requirement that plaintiffs be near the scene of the accident, expressly noting the need to limit liability.⁸⁷

82. 52 Hawaii 156, 472 P.2d 509 (1970).

83. *Id.* at 174, 472 P.2d at 520.

84. *Id.* at 175, 472 P.2d at 521.

85. *Leong v. Takasaki*, 55 Hawaii 398, 520 P.2d 758 (1974).

86. *Kelley v. Kokua Sales & Supply, Ltd.*, 56 Hawaii 204, 208-09, 532 P.2d 673, 676 (1975).

87. The court stated:

[I]n the factual context of the instant case, we are of the opinion that merely requiring the proof of serious mental distress, rather than minor mental distress, does not realistically and reasonably limit the liability of the appellees. Without a reasonable and proper limitation of the scope of the duty of care owed by appellees, appellees would be confronted with an unmanageable, unbearable and totally unpredictable liability. [As stated by Dean Prosser:] "It would be an entirely unreasonable burden on all human activity if the defendant who has endangered one man were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured, as well as his friends. . . ."

Stated in a different terminology, but reaching the same conclusion as above, we hold that the appellees could not reasonably foresee the consequences to Mr. Kelley. Clearly, Mr. Kelley's location from the scene of the accident was too remote. We hold that the duty of care enunciated in *Rodrigues* and *Leong* . . . applies to plaintiffs meeting the standards stated in said cases, and who were located within a reasonable distance from the scene of the accident.

Id. at 208-09, 532 P.2d at 676 (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS

It is apparent that the use of a foreseeability standard to assess non-physical damages often is inconsistent with the kinds of injuries that courts, and society, are prepared to compensate. Courts will compensate for foreseeable physical injuries, but are not willing to "open the floodgates" by compelling compensation for all foreseeable mental distress. A major policy concern of the courts is that compensation for foreseeable intangible losses should not impose too much of a burden on potential defendants and the insured community.⁸⁸ The California Supreme Court, quoting the New York Court of Appeals, has expressed this concern as follows: "'Every injury has ramifying consequences, like the ripples of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree.'" ⁸⁹ This tension is reflected in *Dillon* itself, which on the one hand utilized and glorified the concept of foreseeability, but on the other hand issued guidelines that limit recovery even when the plaintiff has suffered clearly foreseeable mental injury.

Thus the question finally can be posed: Is there a workable and analytically sound way to use foreseeability as a determinant of liability while limiting compensation to socially acceptable levels? To answer this question it is useful to examine the California case of *Molien v. Kaiser Foundation Hospitals* and compare the cases involving other branches of intangible tort law.

§ 54, at 334 (4th ed. 1971)). Although the court purported to adhere to a foreseeability analysis, it in fact imposed a vague spatial limit unrelated to a foreseeability analysis. Such a result is reminiscent of the *Dillon* guidelines. See *supra* notes 38-59 & accompanying text.

The arbitrariness of limited liability based on mere "geography" is illustrated by the Hawaii Supreme Court's subsequent decision in *Campbell v. Animal Quarantine Station*, 63 Hawaii 557, 632 P.2d 1066 (1981), in which the court allowed six members of the plaintiff family to recover for mental distress caused by the accidental death of the family dog. The *Campbell* court distinguished *Leong*, stating that the geographical limitation requiring "reasonable distance from the scene of the tortious event" was met "since the plaintiffs and their dog were [all] located in Honolulu." *Id.* at 561-62, 632 P.2d at 1069.

88. See *supra* note 75 and *infra* notes 89, 125-32 & accompanying text.

The recent English decision of *McLoughlin v. O'Brien*, [1982] 2 W.L.R. 982, may be read to endorse foreseeability as the appropriate limitation on liability for mental distress. See *Tepp, Liability for Negligently Inflicted Nervous Shock*, 99 LAW Q. REV. 100 (1983). Since the level of compensation in England for intangible losses is so much lower than in America the need to consider the problem of excessive liability is not as compelling in England. See *Hinz v. Berry*, 2 Q.B. 40, [1970] 1 All E.R. 1074; P. JAMES & D. BROWN, *GENERAL PRINCIPLES OF THE LAW OF TORTS* 432-34 (4th ed. 1978).

89. *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 446, 563 P.2d 858, 862, 138 Cal. Rptr. 302, 306 (1977) (quoting *Tobin v. Grossman*, 24 N.Y.2d 609, 619, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561 (1969)). In *Borer*, the court decided that there was no cause of action for loss of affection and society between parent and child when a parent was negligently injured. See *infra* notes 121-36 & accompanying text.

Molien v. Kaiser Foundation Hospitals: Pure Foreseeability Revived

Some commentators believe that the 1980 California Supreme Court decision in *Molien v. Kaiser Foundation Hospitals*⁹⁰ points the way out of the *Dillon* quagmire. The court allowed a husband to recover for mental distress caused by an incorrect diagnosis that his wife had syphilis and by the resulting breakup of their marriage. Defendant Kaiser argued that the husband did not meet the *Dillon* requirements because he neither observed the alleged negligent diagnosis nor was near the scene of that diagnosis.⁹¹ The court, however, concluded that the three *Dillon* guidelines were relevant only when the plaintiff sought recovery as a *bystander* who "suffered as a percipient witness to the injury of a third person."⁹² The *Molien* court held that the "plaintiff was himself a direct victim of the assertedly negligent act"⁹³ because the disease is normally transmitted only by sexual relations.⁹⁴ For the same reason, and because marital suspicion and hostility are predictable results of such a diagnosis, the court found that injury to the plaintiff was reasonably foreseeable.⁹⁵ Moreover, the court rejected the notion that the mental distress of "direct victims" must be physically manifested.⁹⁶ The court concluded that *Dillon* was relevant to *Molien* only for its affirmation of the "general principle of foreseeability."⁹⁷

Molien has been praised by several commentators as a reaffirmation of the broad foreseeability standard that was endorsed at least in principle by the *Dillon* court.⁹⁸ Yet, in *Hathaway* and *Cortez*, both decided after *Molien*, the court of appeal strictly applied the *Dillon* guidelines, noting that *Molien* was inapposite to bystander mental distress cases.⁹⁹ It would thus appear that the California courts now impose a

90. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980). See *infra* note 98 & accompanying text.

91. *Molien*, 27 Cal. 3d at 921, 616 P.2d at 815, 167 Cal. Rptr. at 833.

92. *Id.* at 922-23, 616 P.2d at 816, 167 Cal. Rptr. at 834.

93. *Id.*

94. *Id.* at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.

95. *Id.*

96. *Id.* See *infra* notes 110-14 & accompanying text (elimination of requirement of physical manifestation of injury).

97. *Id.* at 929-30, 616 P.2d at 821, 167 Cal. Rptr. at 839.

98. See, e.g., Nolan & Ursin, *supra* note 3, at 610; Comment, *supra* note 3, at 312; Comment, *supra* note 13, at 187-88.

99. *Hathaway*, 112 Cal. App. 3d at 736-37, 169 Cal. Rptr. at 440-41; *Cortez*, 110 Cal. App. 3d at 648-50, 167 Cal. Rptr. at 909-10. Because the diagnosis of syphilis in *Molien* could be construed as a diagnosis that the husband was the source of the infection, the facts in *Molien* can be distinguished from the alleged malpractice in *Cortez* and *Justus* in which parents were precluded from recovering for mental distress. The alleged malpractice in

traditional or "pure" foreseeability test for "direct victims" of negligently inflicted mental distress, but invoke the three *Dillon* criteria for "bystanders" who seek recovery for such mental distress.

While it may be possible to distinguish between "direct" and "bystander" victims, one recent California Court of Appeal decision obscured any meaningful distinction. In *Sesma v. Cueto*,¹⁰⁰ the expectant parents claimed mental distress as a result of alleged medical negligence resulting in stillbirth. The court rejected the defendants' argument that the mother could be characterized as a bystander during the delivery operation and thus be limited in her recovery by *Dillon*.¹⁰¹ It further held that *Molien* "supports the conclusion that . . . the father . . . may be able to show that he is a 'direct victim'—if not percipient witness—of negligent acts giving rise to infliction of serious emotional distress."¹⁰² The *Sesma* court's broad conception of "direct victim" on these facts contradicts the California Supreme Court's pre-*Molien* decision in *Justus*,¹⁰³ and demonstrates the hazards of trying to characterize an injury as "direct" or "indirect."¹⁰⁴ This distinction is reminiscent of the difficulty faced by those courts attempting to distinguish direct from indirect causes for purposes of determining proximate cause rather than rely on a single standard such as foreseeability.¹⁰⁵ Aside from this

Molien involved a diagnosis concerning the husband as well as his wife in light of the sexual nature of the disease.

100. 129 Cal. App. 3d 108, 181 Cal. Rptr. 12 (1982).

101. *Id.* at 115 n.2, 181 Cal. Rptr. at 15 n.2.

102. *Id.* at 116, 181 Cal. Rptr. at 16.

103. See *supra* notes 53-56 & accompanying text.

104. The *Sesma* court's concept of "direct" liability was expanded even further in a products liability case, *Kately v. Wilkinson*, 148 Cal. App. 3d 576, 195 Cal. Rptr. 902 (1983). The California Court of Appeal found that the plaintiffs were direct victims of a manufacturer's negligence. The plaintiffs, a mother and daughter, witnessed the death of a close friend in a water skiing accident. The mother was the owner and operator of the boat pulling the skier, and the daughter was a passenger in the boat "spotting" the skier. The steering wheel locked as a result of an alleged defect in the boat, causing the boat to collide with and kill the skier. The plaintiffs brought claims for negligent infliction of emotional distress under *Dillon*, but the court barred these claims because the plaintiffs did not have a legally cognizable relationship with the skier. *Id.* at 585, 195 Cal. Rptr. at 907. The court held, however, that the plaintiffs were direct victims under *Molien*. *Id.* at 587-88, 195 Cal. Rptr. at 909. The court reasoned that the manufacturer "should reasonably have foreseen that Kately, as purchaser and operator of the defective boat, would suffer emotional distress when the boat malfunctioned and killed or injured another human being." *Id.* Moreover, because of a state statute that requires the presence of someone in the boat to observe the progress of the skier, "it was certainly foreseeable that [the daughter] who undertook this duty, would witness any injury to the water-skier . . . [and] suffer emotional distress [as a result]." *Id.* at 588-89, 195 Cal. Rptr. at 910.

105. See F. HARPER & F. JAMES, *supra* note 23, § 20, at 1155-56; W. PROSSER, *supra* note 21, § 43, at 250-70.

difficulty, the direct/indirect distinction does not eliminate the inconsistent recoveries allowed "indirect" plaintiffs subject to the *Dillon* rules.

Several recent proposals advocate extending the *Molien* foreseeability analysis to cover both "direct" and "indirect" victims of negligent infliction of mental distress, while limiting recovery to "serious" distress.¹⁰⁶ These proposals simply do not confront the fundamental judicial concern about excessive recovery. Barring recovery for minor emotional injury may eliminate some litigation and legal costs,¹⁰⁷ as well as the cumulative impact of small recoveries, but will have no impact on the potential for substantial recoveries for real and foreseeable psychological trauma. Such "serious" distress claims are to be expected in most cases brought by relatives.

An earlier proposal to alter the *Dillon* guidelines so that all close relatives, regardless of their "nearness" to the accident, could recover for foreseeable mental distress,¹⁰⁸ suffers from the same weakness. It approximates a pure foreseeability standard but offers no significant additional limitation on recovery beyond the concept of foreseeability. The proposal would not eliminate the problem of excessive recoveries, as "close relatives" would present most of the valid claims anyway.

In summary, neither the *Dillon* court's strictly limited notion of foreseeability nor the *Molien* court's elaboration of the standard offers hope of resolving the compensation dilemma. However, the courts have addressed this problem in cases involving intangible losses other than mental distress. A review of these cases will bring into focus the appropriate response.

Other Developments in Intangible Tort Law—The Dividing Lines Disappear

One of the most significant aspects of the *Molien* decision is the court's rejection of the requirement of physical manifestation of injury in "direct" negligent infliction of mental distress cases.¹⁰⁹ The *Molien* court noted that the physical manifestation requirement had been justified as a mechanism to insure that emotional distress is genuine,¹¹⁰ but

106. See *supra* note 13.

107. No recovery is permitted in any event without proving culpable negligent behavior. This principle already precludes recovery for much minor mental distress.

108. See Liebson, *supra* note 3, at 195-201; see also Comment, *Horizons*, *supra* note 3, at 198-201; Comment, *Recognizing*, *supra* note 3, at 168.

109. *Molien*, 27 Cal. 3d at 924-31, 616 P.2d at 817-21, 167 Cal. Rptr. at 835-39.

110. *Id.*

concluded that false claims are poorly screened by a rule that permits physical injury no matter how trivial to be "the ticket for admission to the courthouse."¹¹¹ The opinion reasoned that the requirement "denies court access to claims that may well be valid and could be proved if the plaintiffs were permitted to go to trial."¹¹² The court also concluded that the requirement of physical injury encouraged "extravagant pleading and distorted testimony" and forced victims to emphasize in their testimony symptoms that are difficult to verify such as headaches, nausea, and insomnia.¹¹³ The court noted that modern medical and psychiatric knowledge no longer recognize a clear distinction between purely mental and physical injury and that efforts to distinguish them are artificial and arbitrary, and obscure consideration of "whether the plaintiff has suffered a serious and compensable injury."¹¹⁴

The court has recognized that the same reasoning applies to *Dillon* bystander types of claims as well. In *Hedlund v. Superior Court*,¹¹⁵ the court allowed a *Dillon*-type claim on allegations of psychological trauma alone, concluding that *Molien* had abrogated the physical injury requirement of *Dillon*.¹¹⁶

By abolishing the physical injury requirement, *Molien* and *Hedlund* undermine the court's rationale in its earlier decision in *Borer v. American Airlines, Inc.*¹¹⁷ for distinguishing the tort of negligent infliction of mental distress from other torts giving rise to independent claims for intangible damages.

Three years before *Borer*, in *Rodriguez v. Bethlehem Steel Corp.*,¹¹⁸ the California Supreme Court held that a married person whose spouse had been injured by the negligence of a third party could maintain a cause of action for loss of consortium. The court defined loss of consortium as the "loss of conjugal fellowship and sexual relations,"¹¹⁹ which included such intangible damages as the loss of love, companionship, society, sexual relations, and household services.¹²⁰

In *Borer v. American Airlines, Inc.*,¹²¹ however, the court rejected

111. *Id.* at 928, 616 P.2d at 820, 167 Cal. Rptr. at 838.

112. *Id.* at 928-29, 616 P.2d at 820, 167 Cal. Rptr. at 838.

113. *Id.* at 929, 616 P.2d 820, 167 Cal. Rptr. at 838.

114. *Id.* at 929-30, 616 P.2d at 821, 167 Cal. Rptr. at 839.

115. 34 Cal. 3d 695, 669 P.2d 41, 194 Cal. Rptr. 805 (1983).

116. *Id.* at 706 n.8, 669 P.2d at 47 n.8, 194 Cal. Rptr. 811 n.8.

117. 19 Cal. 3d 441, 450, 563 P.2d 838, 864-65, 138 Cal. Rptr. 302, 308-09 (1977).

118. 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974).

119. *Id.* at 385, 525 P.2d at 670, 115 Cal. Rptr. at 766 (1974).

120. *Id.* at 404-05, 525 P.2d at 684, 115 Cal. Rptr. at 780.

121. 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977).

the contention that "logical symmetry" compelled it to recognize a similar cause of action for loss of affection and society between parent and child when a parent was negligently injured.¹²² The *Borer* court noted that there were qualitative differences that distinguished the spousal relationship from the parent-child relationship, specifically the difference of sexual relations. Yet the court acknowledged that loss of consortium suits compensated for intangible losses beyond mere deprivation of sexual relations.¹²³ Indeed, "[c]ertain aspects of spousal relationship are similar to those of the parent-child relationship, and there can be little question of the reality of the loss suffered by a child deprived of the society and care of its parent."¹²⁴

Nevertheless, the *Borer* court concluded that "strong policy reasons" justified denying compensation for loss of society between parent and child.¹²⁵ Specifically, while suits by spouses for lost consortium involve only one additional plaintiff, the "problems of multiplication of actions and damages" that could result from authorizing children to sue for loss of parental society "might well become a serious problem to a particular defendant as well as in terms of the total cost of such enhanced awards to the insured community as a whole."¹²⁶ The court reasoned:

We cannot ignore the social burden of providing damages for loss of parental consortium merely because the money to pay such awards comes initially from the "negligent" defendant or his insurer. Realistically the burden of payment of awards for loss of consortium must be borne by the public generally in increased insurance premiums or, otherwise, in the enhanced danger that accrues from the greater number of people who may choose to go without any insurance. We must also take into account the cost of administration of a system to determine and pay consortium awards; since virtually every serious injury to a parent would engender a claim for loss of consortium on behalf of each of his or her children, the expense of settling or litigating such claims would be sizable.¹²⁷

The court therefore distinguished *Borer* from other cases in which it had emphasized foreseeability as the only proper limitation on duty. The court noted that those decisions did not involve "the creation of a

122. *Id.* at 446, 563 P.2d at 862, 138 Cal. Rptr. at 306. In a companion case, the court rejected a parent's claim for loss of society for an injured child. *Baxter v. Superior Court*, 19 Cal. 3d 461, 563 P.2d 871, 138 Cal. Rptr. 315 (1977).

123. *Borer*, 19 Cal. 3d at 448, 563 P.2d at 863, 138 Cal. Rptr. at 307.

124. *Id.* at 446, 563 P.2d at 862, 138 Cal. Rptr. at 306 (quoting *Suter v. Leonard*, 45 Cal. App. 3d 744, 746, 120 Cal. Rptr. 110, 111 (1975)).

125. *Id.* at 447, 563 P.2d at 862, 138 Cal. Rptr. at 306.

126. *Id.* at 448-49, 563 P.2d at 863, 138 Cal. Rptr. at 307.

127. *Id.* at 447, 563 P.2d at 862, 138 Cal. Rptr. at 306.

new cause of action for solely intangible damages, attended with problems of multiplication of claims and liability."¹²⁸

Moreover, the court noted that it is difficult to measure the amount of damages in such cases because of their "intangible character"¹²⁹:

Loss of consortium is an intangible, nonpecuniary loss; monetary compensation will not enable plaintiffs to regain the companionship and guidance of a mother; it will simply establish a fund so that upon reaching adulthood, when plaintiffs will be less in need of maternal guidance, they will be unusually wealthy men and women. To say that plaintiffs have been "compensated" for their loss is superficial; in reality they have suffered a loss for which they can never be compensated; they have obtained, instead, a future benefit essentially unrelated to that loss.¹³⁰

These concerns, while not enough to preclude a loss-of-spousal-consortium tort, were viewed as significant in the context of parent-child claims where there is the potential for multiple plaintiffs.¹³¹

The court also noted the danger of the duplicative recovery that might result if a child were permitted to recover for loss of parental society.¹³² The court persuasively distinguished its willingness in *Krouse v. Graham*¹³³ to allow non-pecuniary damages for loss of parent-child society in a wrongful death claim, an interpretation not compelled by the wrongful death statute.¹³⁴ The court observed that, if the parent dies, "the wrongful death action serves as the only means by which the family unit can recover compensation for the loss of parental care and services."¹³⁵ In the case of non-fatal injury, however, the victim's personal injury claim may provide substantial recovery to the family unit.¹³⁶

Most significantly, the *Borer* court carefully distinguished loss of parent-child society actions from *Dillon*-type mental distress actions on the ground that the plaintiff in *Dillon* was required to show physical injury caused by witnessing the infliction of injury upon a family member.¹³⁷ The *Borer* court concluded that *Dillon* supported its decision "to deny a cause of action founded upon purely intangible injury."¹³⁸

128. *Id.* at 450, 563 P.2d at 864, 138 Cal. Rptr. at 308.

129. *Id.* at 448, 563 P.2d at 863, 138 Cal. Rptr. at 307.

130. *Id.* at 447, 563 P.2d at 862, 138 Cal. Rptr. at 306.

131. *Id.* at 448-49, 563 P.2d at 863, 138 Cal. Rptr. at 307.

132. *Id.* at 448, 563 P.2d at 863, 138 Cal. Rptr. at 307.

133. 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977).

134. *Id.* at 67-68, 562 P.2d at 1025-26, 137 Cal. Rptr. at 866-67.

135. *Borer*, 19 Cal. 3d at 452, 563 P.2d at 866, 138 Cal. Rptr. at 310.

136. *Id.*

137. *Id.* at 450, 563 P.2d at 864-65, 138 Cal. Rptr. at 308-09.

138. *Id.*

In light of the court's decisions in *Molien* and *Hedlund*, this distinction between physical and non-physical manifestation of psychological injury no longer exists, and *Dillon* bystander claims only can be logically viewed in the context of loss of society and other intangible tort claims. The policy concerns expressed by the *Borer* court are clearly germane to *Dillon*-type claims.

Toward a Unified Theory of Compensation

Independent developments in various areas of intangible tort law provide inconsistent rules that may bear little relation to underlying policy. Victims of injury to the parent-child relationship are denied compensation for intangible damages for loss of society, while victims of injury to a spousal relationship are granted compensation for "loss of consortium," which include similar intangible losses.¹³⁹ The *Dillon* and *Molien* rules mandate liability only for some instances of foreseeable negligent infliction of emotional distress without making principled distinctions between those plaintiffs who receive or are denied compensation. A plaintiff qualifying under *Dillon* may also recover under a loss of consortium claim if it is a spouse who is injured. On the other hand, if a child or parent is injured, the plaintiff-parent or child will be denied recovery for loss of society and perhaps, depending on the circumstances, for a *Dillon*-type mental distress claim as well.¹⁴⁰ Furthermore, the primary victim's own recovery may provide either excessive or gravely inadequate compensation for the special out-of-pocket expenses incurred by relatives and others as a result of mental distress and loss of society,¹⁴¹ and there is no assurance that what is recovered will be appropriately allocated to third parties.

Despite such inconsistent standards for liability and recovery, the courts have clearly indicated the policy imperatives that should shape intangible tort law. There is, of course, a fundamental commitment to the use of foreseeability as a tool of justice. Foreseeability facilitates rational risk spreading and correlates liability with the risks that the defendant should expect. This commitment to foreseeability is tempered by the court's desire not to place an excessive economic burden on potential defendants and the insured community. The mechanical application of the *Dillon* rules by the California Supreme Court, its effort to limit foreseeability principles to "direct victims" in *Molien*,

139. See *supra* notes 121-31 & accompanying text.

140. See *supra* notes 132-36 and *infra* notes 141-57 & accompanying text.

141. See *infra* notes 149-50 & accompanying text.

and its rejection in *Borer* of a cause of action for loss of society between parent and child, all clearly indicate that this limit on duty is a foremost concern.

The court is also clearly concerned about the danger of double recovery within the single economic unit of the family, especially in the case of intangible damages.¹⁴² The court has no doubt also considered that permitting multiple family members to recover for intangible losses would substantially increase the cost of recovery to the insured community. Indeed, the court's willingness in *Molien* to fully compensate "direct" but not "indirect" victims of mental distress can be understood as an effort to eliminate possible double recovery by the family unit.¹⁴³

It is time to reconcile these competing policy imperatives and establish a rational, uniform system that will equitably compensate victims of intangible torts while reasonably limiting the exposure of defendants and minimizing the danger of multiple recoveries in the family unit. There are two evident paths.

One approach is to compensate all intangible psychological injuries on the same basis that traditional physical injuries are compensated, limited only by the threshold barrier of foreseeability. This would eliminate the inequitable exclusion of some intangible psychological losses. It would not, however, allay judicial fears of infinite liability. Indeed, courts appear remarkably united in their resistance to such an approach. While Hawaii had articulated a pure foreseeability standard for negligent infliction of mental distress, it subsequently recanted.¹⁴⁴ The majority physical zone of danger rule and the *Dillon* guidelines also represent attempts to prevent excessive liability. Few states recognize loss of parent-society claims brought by a child¹⁴⁵ and only a small minority recognize a negligence claim for loss of child-society brought by a parent.¹⁴⁶

The recent cases add new support to the better approach, first ad-

142. See *supra* notes 132-36 & accompanying text. See also Ursin & Levy, *Tort Law in California: At the Crossroads*, 67 CALIF. L. REV. 497, 521-30 (1979), for an excellent discussion of family unit recovery.

143. See *supra* notes 83-87 & accompanying text.

144. See *supra* note 87 & accompanying text.

145. See *Weil v. Moes*, 311 N.W.2d 259 (Iowa 1981); *Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507, 413 N.E.2d 690 (1980); *Berger v. Weber*, 411 Mich. 1, 303 N.W.2d 424 (1981).

146. See, e.g., *Drayton v. Jiffey Chem. Corp.*, 395 F. Supp. 1081 (N.D. Ohio 1975); *Miller v. Subia*, 514 P.2d 79 (Colo. App. 1973); *Shockley v. Prier*, 66 Wis. 2d 394, 225 N.W.2d 495 (1975).

vanced by Professor Richard Miller, that a defendant's liability should extend to *all* foreseeable plaintiffs who suffer serious mental injury, but that recovery should be limited to economic "out of pocket" losses.¹⁴⁷ The inconsistencies among the intangible tort cases further suggest that Miller's thesis should be substantially extended to include similar compensation for independent tort claims based on loss of consortium between spouses and loss of society between parent and child.

Such an approach in the context not only of negligent infliction of mental distress, but also loss of consortium and society, would address the basic policy dilemma articulated by the courts in recent decisions. It would retain foreseeability as the standard for determining liability, but would place a reasonable limit on the potential burden on defendants, and would eliminate the danger of multiple recoveries by requiring each plaintiff to demonstrate out-of-pocket losses. Such an approach would also eliminate the arbitrary denial of recovery by plaintiffs who do not pass the various tests for recovery under different tort theories for recovery of intangible losses. Fairer compensation to all victims of intangible torts would result.

Limiting recovery to economic loss admittedly would reduce the amount of recovery some plaintiffs would receive for intangible losses. On the other hand, it would expand recovery where recovery is now unfairly denied. So long as the courts remain unwilling to attempt to compensate all intangible losses for the reasons articulated in *Borer*, it appears untenable not to at least compensate as a first priority the out-of-pocket costs caused by mental distress and the loss of society to relatives. Such out-of-pocket losses would include loss of wages, and costs of medical and psychiatric care and services needed to alleviate loss of society or mental distress.

It should be emphasized that broader recovery for non-pecuniary intangible losses to the family unit would still flourish under this approach.¹⁴⁸ If the victim of an accident survives, his or her own personal injury suit allows the plaintiff to recover for pain and suffering and other non-economic injuries. In a wrongful death action, non-pecuniary losses for loss of parent-child society and spousal consortium are now granted in California and can be justified in the unique context of wrongful death actions, as suggested by the *Borer* court, to insure some compensation for the lost life beyond economic loss, as well as to also

147. See *supra* note 16 & accompanying text.

148. Some commentators would not allow *any* compensation for pain and suffering. See *supra* note 16.

provide a fund for contingent attorney fees.¹⁴⁹ Furthermore, in appropriate cases punitive damages can be awarded for personal injury or survival claims.¹⁵⁰

It is understandable that courts would resist unlimited recovery for independent tort actions based on loss of society and mental distress claims when the family unit already recovers for intangible injuries. Yet there may be severe out of pocket losses suffered by a relative, friend, or bystander that are not adequately accounted for by the personal injury or wrongful death recovery.¹⁵¹ *Dillon*-type mental distress claims, loss of spousal consortium, and parent-child society claims should be viewed as parasitic recoveries that meet additional real out-of-pocket needs rather than giving additional bounty to some and ignoring potentially severe needs of others. So long as there must be limits, there must also be principled priorities. In short, the courts should view intangible tort recovery in a unified context.

A recent California Supreme Court case, *Turpin v. Sortini*,¹⁵² now followed in the state of Washington,¹⁵³ may demonstrate a new willingness to utilize a limited recovery approach. In *Turpin*, the supreme court recognized a new tort for "wrongful life" and allowed a child to recover damages from a defendant who negligently allowed his birth. The court restricted recovery to special damages for the extraordinary expenses incurred by the child for specialized teaching and equipment, refusing a claim for general damages.¹⁵⁴ The court noted that in *Borer* it had declined to recognize a new cause of action for the loss of affection and society of the parent-child relationship because "monetary damages would neither relieve nor provide meaningful compensation for the child's or parent's loss,"¹⁵⁵ and because of the difficulty of measuring intangible damages.¹⁵⁶ Nevertheless, the *Turpin* court recognized that when extraordinary medical and other expenses are caused

149. See *supra* notes 133-36 & accompanying text. If the courts continue to distinguish between direct and bystander claims, an argument could be made for allowing recovery for non-pecuniary losses in "direct" claims, since recovery for intangible injury will not otherwise be provided for in a primary victim's personal injury or wrongful death claim. But see *supra* 100-04 (discussion of extending concept of "direct victim"). See also Comment, *Recognizing*, *supra* note 3, at 162-67.

150. See, e.g., *In re Paris Air Crash*, 622 F.2d 1315 (9th Cir. 1980).

151. See *supra* notes 132-36.

152. 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

153. *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 656 P.2d 483 (1983).

154. *Turpin*, 31 Cal. 3d at 237-38, 643 P.2d at 965, 182 Cal. Rptr. at 348.

155. *Borer*, 19 Cal. 3d at 447, 563 P.2d at 871, 138 Cal. Rptr. at 315.

156. *Turpin*, 31 Cal. 3d at 237, 643 P.2d at 965, 182 Cal. Rptr. at 348 (quoting *Baxter v. Superior Court*, 19 Cal. 3d 461, 464, 563 P.2d 871, 871, 138 Cal. Rptr. 315, 315 (1977)).

by negligence, public policy requires that the measurable loss be borne by the negligent party.¹⁵⁷ The *Turpin* court's recognition of the wrongful life theory reflects a willingness to accept a new tort while limiting the damages available upon a finding of liability. Such an approach for the torts of negligent infliction of mental distress and loss of consortium and society would ensure appropriate compensation while avoiding excessive liability and inequitable line drawing. In short, a new remedy is available to resolve the old *Dillon* paradox.

Conclusion

Dillon v. Legg and the line of cases following it are flawed. They affirm the concept of compensating all foreseeable plaintiffs for the negligent infliction of mental distress and then provide criteria that do not correspond with foreseeability. The error in *Dillon* and its progeny is not, as some have suggested, the rigid application of criteria that were meant as mere guidelines to determine whether the plaintiff is foreseeable and consequently owed a duty. The error consists of using foreseeability to limit compensation in the first instance. While ideally all mental distress should be compensated, expediency and practicality often preclude compensation when the liability would be too much of a burden on socially useful activity that on occasion may be conducted negligently.

The majority rule limiting compensation to those within the physical zone of danger and the rules espoused in *Dillon* and *Molien* all attempt to utilize the concept of duty to choose the plaintiff who will be compensated. Yet none of these guidelines focuses either on foreseeability or on any other equitable rationale. The courts should, after sixteen years of confusion and arbitrary line drawing, focus on what kinds of damages should be compensated and make possible equitable compensation of all foreseeable plaintiffs. By compensating mental distress, but only to the extent of economic losses, courts would reconcile the competing policies underlying intangible tort law and eliminate the resulting confusion and inequities. The recent California Supreme Court decision in *Turpin v. Sortini* suggests that some courts may now be receptive to such an approach.

157. *Id.* at 238, 643 P.2d at 965, 182 Cal. Rptr. at 348.